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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CALIFORNIA  
NORTHERN DISTRICT**

Carl A. Wescott,

Plaintiff,

vs.

David Crowe; Mike Lyonette;  
Thomas P. Madden; Taylor Collins; Jeff Rau;  
Darrell Bushnell; Amy Bushnell;  
Peter Tierney; Kathy Fettke; Susie Yee;  
Norman Davies; Claire Davies; Sandra Winfrey;  
Brian Putze; Colin Ross; Brad Malcolm;  
Michael Jimenez; Gustavo Varela; Robert  
Crowe; Bernadette Brown; Federico Gurdian;  
Terencio Garcia, Does 1 through 50,

Defendants.

No: 3:20-cv-06456-JD

**DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS**

Hearing Date: Thurs., Dec. 3, 2020  
Hearing Time: 10:00 a.m.  
Courtroom: 11  
Judge: Hon. James Donato

Defendants David Crowe, Mike Lyonette, Thomas P. Madden, Colin Ross, Brad Malcolm, and Michael Jimenez ("Defendants") respectfully submit the following reply in support of their Motion to Dismiss the Plaintiff's First Amended Complaint (Doc. #12). Plaintiff admits he is on the California Vexatious Litigant List but unpersuasively argues it does not apply. Plaintiff admits that the contract referenced in his original complaint does not name any of the Defendants (except for two, thereby essentially admitting he did not state a claim against them) but then tries to improperly submit "new facts" to try to support his claims. Finally, Plaintiff admits that all other causes of action (except breach of contract) in his Amended Complaint are insufficient to state a

claim but argues that instead of dismissal he should be given leave to amend, yet does not explain to the Court how leave to amend will give him a basis to properly state a claim. Simply put, Plaintiff's Opposition did not rebut any of the three main reasons for granting Defendants' Motion to Dismiss. Accordingly, the Court should grant Defendants' Motion and Dismiss the case.

#### A. VEXATIOUS LITIGANT LIST

Defendants' first basis for dismissal of the case is that Plaintiff is prohibited from pursuing his claim because he is on the California Vexatious Litigant List (the "List") and did not comply with the applicable requirements in order to file a lawsuit while on the List. Plaintiff's response is an acknowledgement that he is on the List – his argument though is that being on the List is irrelevant now because he filed this lawsuit in Arizona. This argument should be rejected for several reasons.

First, this lawsuit is now in California. Plaintiff did not cite to any authority that says that Cal. Civ. Proc. Code §§ 391 et seq. is not applicable to a case that was originally filed in one state but transferred to this state because of lack of jurisdiction.

Second, Plaintiff is bound by his agreement that California law applies to the subject contract. In the original Complaint, Plaintiff attached the subject contract (called the "Funding Agreement"), which clearly states that California law applies. *See original Complaint, Ex. A, ¶20* (the "Contract"). Accordingly, Plaintiff agreed that California law applies to this subject dispute, and as such, even if he originally filed in Arizona his lawsuit is governed by California law, which means he is still subject to Cal. Civ. Proc. Code §§ 391 et seq. and had to abide by its terms, which he did not.<sup>1</sup>

Third, Plaintiff seeks to have this Court reward him from trying to avoid the effects of Cal. Civ. Proc. Code §§ 391 et seq. by filing in Arizona. It is beyond dispute that before Plaintiff initiated this Lawsuit he: a) **knew** he agreed in the Contract that California law governed his relationship with Defendants; b) **knew** that he was on the Vexatious Litigant list in California and

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<sup>1</sup> It should be noted that Plaintiff filed in a state court in Arizona; not federal court. Plaintiff now wants to say that federal law applies because he contends it is more lax than California state law on what constitutes a vexatious litigant and the ramifications of being so designated. However, Plaintiff did not so plead in his Complaint, or his Amended Complaint, and even if he had he would still be bound by his contractual obligation to have California state law apply.

1 could not file this lawsuit in California; and c) **admitted** he filed in Arizona to try to avoid the  
 2 consequences of Civ. Proc. Code §§ 391 et seq. The Court should not reward Plaintiff for  
 3 knowingly trying to avoid the effects of California law to which he agreed and was subject.

4 **B. PLAINTIFF’S IMPROPER INCLUSION OF NEW FACTS**

5 Defendants’ second ground for dismissal is under Fed. R. Civ. P. 12(b), wherein they allege  
 6 Plaintiff has failed to set forth a set of facts in the Amended Complaint that entitle him to any relief.  
 7 Plaintiff, in his Opposition, points to the presumed ignorance of the undersigned as to the reason  
 8 that Defendants state that only two of the many Defendants were parties to the contract with  
 9 Plaintiff. Yet, the contract clearly lists the names of only two Defendants as signers – David Crowe  
 10 and Mike Lyonette. All other Defendants must be dismissed from this action because they are not  
 11 signers to the contract. As to Mr. Crowe and Mr. Lyonette, as will be discussed below, Plaintiff did  
 12 not in his Opposition overcome the undisputable fact that these Defendants were relieved of any  
 13 contractual obligation to fund the subject project because Plaintiff lost it before funding was  
 14 arguably required. Consequently, there is no basis on which Plaintiff is entitled to any relief against  
 15 any of the Defendants.

16 Plaintiff tries to avoid this unavoidable conclusion by introducing “new facts” in his  
 17 Opposition, going so far as to assert there are other contracts that exist and were allegedly breached.  
 18 However, it is well settled that in Fed. R. Civ. P. 12 motions briefing a plaintiff is limited to the  
 19 facts as alleged in his operative complaint. Fed. R. Civ. P. 12(d); *Grossman v. Nationsbank, N.A.*,  
 20 225 F.3d 1228, 1231 (11th Cir. 2000). The Court should not consider Plaintiff’s declaration, nor any  
 21 of the new allegations of other contracts. Since Exhibit A to the original Complaint shows that  
 22 Defendants Thomas P. Madden, Jeff Rau, Colin Ross, Brad Malcolm, and Michael Jimenez were  
 23 not parties to the Contract, and since there is nothing in the Amended Complaint that states, or even  
 24 suggests Plaintiff has a viable claim against these Defendants, the Court should dismiss these  
 25 Defendants from this lawsuit. Further, while Defendants David Crowe and Mike Lyonette were  
 26 parties to the Funding Contract, their performance was excused because of the cancellation of  
 27 Plaintiff’s underlying contract to acquire the subject project, and therefore they too should be  
 28 dismissed, as well.

1                   **C.        PLAINTIFF’S RULE 8 FAILURES**

2                    Defendants’ third grounds for dismissal of the Amended Complaint is that it fails to meet  
 3                    the minimum pleadings standards as forth in Fed. R. Civ. P. 8. Plaintiff has the burden of proving  
 4                    that the Amended Complaint meets these minimum standards. However, instead of showing the  
 5                    Court how his allegations are direct and understandable, Plaintiff tries to shift the burden to  
 6                    Defendants. Plaintiff bears the burden of meeting the Rule 8 minimum pleadings standards. Fed. R.  
 7                    Civ. P. 8(e)(1).

8                    This Court can review the Amended Complaint and see where it falls short. The Amended  
 9                    Complaint seemingly demonstrates a story with details, but when looked at from an all-  
 10                    encompassing perspective, those details do not translate into facts to support the causes of action  
 11                    against Defendants.

12                    As the *Bautista* court held, defendants should not have to expend time and effort searching  
 13                    through a mass of conclusory and extraneous allegations in order to determine the essentials claims.  
 14                    *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000). Plaintiff is verbose in effort to  
 15                    obfuscate and confuse. Even more compelling, however, is that Plaintiff does not usually  
 16                    distinguish between each Defendant – he lumps them all in together. It is not sufficient to use the  
 17                    word “Defendants” when suing over a dozen people and imputing the purported actions of one to  
 18                    all the others. Plaintiff’s failure to segregate out the facts that apply to each Defendant are fatal –  
 19                    Plaintiff’s complaint against Defendants must be dismissed.

20                   **D.        PLAINTIFF DOES NOT SHOW THIS COURT HOW HIS AMENDED**  
 21                   **COMPLAINT STATES A VALID CLAIM**

22                    The undersigned’s experience is that rarely do courts dismiss under Rule 8. In this instance  
 23                    though, it is proper because Plaintiff failed to segregate his factual allegations against each  
 24                    Defendant from the other Defendants. This is why Defendants spent significant time in their  
 25                    original motion detailing the pleading deficiencies for each cause of action. Plaintiff’s Opposition  
 26                    did not change, and frankly could not change the fact that Plaintiff has failed to state any particular  
 27                    sustainable claims against Defendants.

**1. Plaintiff cannot state a claim for breach of contract against Defendants**

Plaintiff's only attempt to oppose the Motion to Dismiss on the grounds of his failure to state a claim is that his Amended Complaint states there was a contract, his performance, Defendant's breach, and his damages. However, much like the Amended Complaint, there are no facts demonstrated to show it is true or that he can even state a colorful claim.

As more fully discussed in Defendants' Motion to Dismiss, while Plaintiff did show a contract exists, it is only between Plaintiff and two of the Defendants, neither of whom had the obligation to perform due to Plaintiff's lack of performance in the separate, underlying contract<sup>2</sup>. Plaintiff's claim that all Defendants were parties to the Funding Contract is contradicted by Plaintiff's own statements in his complaints and the Funding Contract attached to the original Complaint itself. Nowhere in the contract are Defendants' names mentioned, with the exception of Defendants Crowe and Lyonette. Nowhere in the Contract is it stated other parties are involved. Therefore, the claim fails as a matter of law and there is no possible way to amend the complaint to make all Defendants a party to it as the Funding Contract speaks for itself.

Plaintiff's conclusion that he showed he performed is also false. By Plaintiff's own statements and exhibits to his complaints, the Funding Contract could not have been fulfilled as the seller of the Seaside Mariana Resort refused to close on the sale to Plaintiff. Therefore, Plaintiff did not perform and no amount of amending will fix this fatal flaw.

Even if each additional Defendant herein were one of the two Defendants who signed the Contract (which they are not), as the seller of the resort refused to close on the sale of the resort, even the two contracting Defendants could not have breached their obligations. There was no closing and therefore, there was nothing to fund. All of these facts are stated in Plaintiff's muddled complaints.

Finally, as to damages, Plaintiff has not shown that he suffered damages (particularly as a result of Defendants' actions), he merely states he would have profited. However, once again,

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<sup>2</sup> The Court should note that despite Plaintiff's lengthy Opposition and inappropriate introduction of "new facts" he still does not deny the truthfulness of Defendants' contention that Plaintiff never acquired the subject project. The Funding Contract, which is before the Court as Exhibit A to the original Complaint, clearly states that even Defendants Crowe and Lyonette had no obligation to fund unless and until Plaintiff acquired clear title to the subject project, which Plaintiff did not allege in his Amended Complaint and cannot truthfully allege even if granted leave to amend.

1 since Plaintiff's purchase of the resort failed, even if the funding had occurred, Plaintiff would  
 2 have not purchased anything to make a profit on. Further, even if the sale had gone through, profit  
 3 is mere speculation for which Plaintiff does not demonstrate how it could have been calculated.

## 4 **2. Plaintiff admits his causes of action fail to state a claim**

5 As to Plaintiff's other five remaining causes of action, Plaintiff does not even attempt to  
 6 justify how they state a claim. He merely offers to amend them to state a claim. However, Plaintiff  
 7 does not demonstrate how he could amend to fix the glaring issues with each cause of action. The  
 8 fact of the matter is that each of these causes of action is predicated upon there being a contract  
 9 between Plaintiff and each of the Defendants. As already demonstrated, most of the Defendants  
 10 were not parties to the Funding Contract and therefore each of these causes of action fail as a  
 11 matter of law. As Plaintiff concedes, his Amended Complaint is insufficient and has failed to  
 12 demonstrate how an amendment would resolve the deficiencies, the Court should grant the Motion  
 13 to Dismiss as to all causes of action and deny leave to amend.

## 14 **E. LEAVE TO AMEND SHOULD BE DENIED**

15 While courts are generally urged to grant leave to amend liberally, the 9<sup>th</sup> Circuit has  
 16 repeatedly held that denial of leave to amend is appropriate "when the pleading could not possibly  
 17 be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Service*, 911  
 18 F.2d 242, 247 (9th Cir. 1990); See also *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996) and  
 19 *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 893 (9th Cir. 2010). Further, the 9<sup>th</sup> Circuit  
 20 has also held that amendment should be denied when it would prejudice the moving defendants.  
 21 *Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997); *Ascon Properties, Inc. v.*  
 22 *Mobil Oil Co.* 866 F.2d 1149, 1161 (9th Cir. 1989); *MV American Queen v. San Diego Marine*  
 23 *Construction Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983) (denial of motion to amend upheld where  
 24 new allegations based on facts moving party already knew would totally alter basis of action and  
 25 necessitate additional discovery).

26 It is clearly shown from Plaintiff's original Complaint and Amended Complaint that only  
 27 two of the Defendants were parties to the Funding Contract which is the subject of the pleadings  
 28

1 and that the contract could not have been fulfilled by those two Defendants due to the resort's  
2 seller's refusal to close on the sale of the resort. There is no amount of amending that can change  
3 these facts. Despite Plaintiff now wanting the Court to look at another purported contract for which  
4 he has not plead a breach of contract, this Court does not have to and should not grant leave to  
5 amend as amendment would be futile and would contain legal issues wholly separate from the case  
6 at issue.

7 Amendment would be prejudicial to Defendants as Plaintiff's new theories go beyond the  
8 scope of the subject contract and seek to alter the basis of the action. Amendment would also be  
9 prejudicial to Defendants here who were not named parties to the Funding Contract as it would  
10 keep them in a case to which Plaintiff has no way to exert a claim against them.

#### 11 **CONCLUSION/PRAYER FOR RELIEF**

12 Plaintiff's Amended Complaint should be dismissed as Plaintiff is on the California  
13 Vexatious Litigant List and is intentionally tried to skirt the rules in order to file this lawsuit,  
14 despite the subject contract requiring it to be brought in California and to be viewed under  
15 California law. Plaintiff's Amended Complaint fails against Defendants for, amongst others, 1)  
16 failure to comply with Rule 8, and 2) failure to comply with Rule 12 in that it fails to state facts  
17 sufficient to support any of the listed causes of action contained in Plaintiff's Amended Complaint.  
18 Leave to amend should be denied as there are no facts which could be alleged to overcome the  
19 deficiencies in the Amended Complaint. As such, Defendants respectfully request that the  
20 Amended Complaint be dismissed and leave to amend be denied.

21 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of November, 2020.

22  
23 ROMERO PARK P.S.

24 By: /s/ H. Troy Romero  
25 H. Troy Romero, CBN #224867  
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**PROOF OF SERVICE BY ELECTRONIC MAIL**

I, Kathy Koback, certify and declare as follows:

I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within-entitled cause. I am an employee with the law firm of Romero Park P.S., whose addresses are 16935 West Bernardo Drive, Suite 260, San Diego, California 92127 and 155 – 108<sup>th</sup> Avenue NE, Suite 202, Bellevue, Washington 98004, which is located in the county where the mailing described below took place.

On November 10, 2020, at my place of business in Bellevue, Washington, a copy of the attached document described as:

**DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO DISMISS**

was sent via electronic mail pursuant to the parties' agreement for acceptance of service via electronic mail, and addressed to:

Carl A. Wescott  
Movenpick Apartments & Hotel (#509) – Bur Dubai  
Opposite American Hospital – 19<sup>th</sup> Street – Oud Metha  
Dubai, UAE (United Arab Emirates) 32733  
*Plaintiff In Pro Per*  
Email: [carlwsoj@gmail.com](mailto:carlwsoj@gmail.com)

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: November 10, 2020.

  
Kathy Koback, Legal Assistant